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Malayan Flour Mills Bhd v Teh Wee Kok

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24–171 OF 2004
ABDUL WAHAB SAID AHMAD J
B 5 AUGUST 2005

Civil Procedure — Time — Extension of time — Application for extension of time to file summons in chambers to set aside court order — Whether delay in making application of any consequence — Whether such delay caused miscarriage of justice — Rules of the High Court 1980 O 42 r 13

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The respondent filed an application ('encl 26') under O 3 r 5 of the Rules of the High Court 1980 ('RHC 1980') for an extension of time to file his summons in chambers ('encl 13') to set aside the court's order dated 17 June 2004 and to declare the Extraordinary General Meeting ('EGM') held on that
D date as invalid. The applicant was a public listed company and the respondent was a director of the applicant. The applicant's solicitors obtained the court's order under s 128(4) Companies Act 1965 that the representations of the respondent received on 16 June 2004, need not be sent out to the members and need not be read out at the EGM. A sealed copy of the draft order was
E served on the respondent at the EGM. The EGM proceeded, and the respondent was removed as a director by majority of votes of the shareholders.

Being dissatisfied, the respondent filed encl 13 pursuant to O 42 r 13 of the RHC 1980 on 6 August 2004, although the last day for filing it was 4 August 2004 while encl 26 for extension of time to file encl 13 was filed on 11 March
F 2005 ie, seven months and seven days from service of sealed order. The respondent's grounds in making the application for extension of time to file encl 13 were: (1) the sealed order dated 17 June 2004 dan the various cause papers and affidavits were served on the respondent's solicitors on 5 July 2004, and further affidavits were served on 12 July 2004; (2) that the respondent
G required time to study the facts and the law in relation to this action and to prepare and affirm encl 13 and the affidavit in support; and (3) that the purported delay was only two days and that no substantial miscarriage of justice had been occasioned to the applicant.

H **Held**, allowing the application for extension of time:

(1) The respondent should not be barred from filing his application because of the two days delay, being 32 days after the service of the cause papers by the applicant's solicitors on 5 July 2004. The fact that the applicant had responded to the respondent's application in encl 13
I showed there was no miscarriage of justice or prejudice to the applicant. Applications of extension of time must be made early but the fact that it was made late should not be a ground for refusal of court's exercise

of discretion. The fact that voluminous exhibit had to be filed in their application under encl 13 resulting in a delay of two days in filing it should be sufficient ground to grant this application notwithstanding the absence of explanation of delay in filing the application in encl 26 (see para 12).

(2) The respondent had acted diligently in pursuing the setting aside of the *ex parte* order. As such, he should not be thwarted from pursuing it because of his failure to give reasons for delay in filing encl 26. The court should be more lenient in applications where the order had been obtained *ex parte* (see para 12).

(3) The respondent should not be denied his day in court to pursue his substantive arguments for setting aside the order of 17 June 2004. This was a fit and proper case for the court to exercise its discretion. There was no way the applicant could possibly have suffered any injustice or prejudice (see para 12).

[**Bahasa Malaysia summary**

Responden memfailkan permohonan ('lampiran 26') di bawah A 3 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT 1980') untuk lanjutan masa untuk memfailkan saman dalam kamar ('lampiran 13') untuk mengetepikan perintah mahkamah bertarikh 17 Jun 2004 dan untuk mengisytiharkan Mesyuarat Umum Tergempar ('EGM') yang diadakan pada hari itu adalah tidak sah. Pemohon merupakan syarikat senarai awam dan responden merupakan pengarah kepada pemohon. Peguam pemohon telah mendapatkan perintah mahkamah di bawah s 128(4) Akta Syarikat 1965 bahawa representasi responden yang diterima pada 16 Jun 2004 tidak perlu dikeluarkan kepada ahli-ahli dan tidak perlu dibacakan pada EGM itu. Sesalinan draf perintah yang dimeterai telah dikemukakan kepada responden di EGM itu. EGM itu diteruskan, dan responden telah disingkir sebagai pengarah oleh undi majoriti pemegang-pemegang saham.

Berasa tidak puas hati, responden telah memfailkan lampiran 13 menurut A42 k 13 KMT 1980 pada 6 Ogos 2004, walaupun hari terakhir untuk memfailkannya adalah 4 Ogos 2004 sementara lampiran 26 untuk lanjutan masa untuk memfailkan lampiran 13 telah difailkan pada 11 Mac 2005, ie tujuh bulan dan sembilan hari selepas penyerahan perintah yang dimeterai. Alasan-alasan responden di dalam membuat permohonan untuk lanjutan masa untuk memfailkan lampiran 13 adalah: (1) perintah yang dimeterai bertarikh 17 Jun 2004 dan bermacam-macam kertas kausa dan afidavit-afidavit telah diserahkan kepada peguam responden pada 5 Julai 2004, dan afidavit-afidavit seterusnya diserahkan pada 12 Julai 2004; (2) responden memerlukan masa untuk mengkaji fakta-fakta dan undang-undang berkaitan dengan tindakan ini dan untuk menyediakan dan mengesahkan fasal 13 dan

afidavit-afidavit sokongan; dan (3) kelewatan itu hanyalah dua hari dan bahawa tiada salah laksana keadilan yang serius yang berlaku ke atas pemohon.

Diputuskan, membenarkan permohonan untuk lanjutan masa:

(1) Responden tidak boleh dihalang daripada memfailkan pemohonan beliau kerana lewat dua hari, yang merupakan 32 hari selepas penyerahan kertas-kertas kausa peguam pemohon pada 5 Julai 2004. Fakta bahawa pemohon telah memberikan respons kepada permohonan responden didalam lampiran 13 menunjukkan tidak terdapatnya salah laksana keadilan atau prejudis kepada pemohon. Permohonan lanjutan masa mestilah dibuat seawal-awalnya tetapi fakta kelewatannya tidak boleh dijadikan alasan penafian budi bicara mahkamah. Fakta terdapatnya bermacam-macam ekshibit yang mesti difailkan di dalam permohonannya di bawah lampiran 13 yang menyebabkan kelewatan selama 2 hari untuk memfailkannya adalah alasan yang wajar untuk membenarkan permohonan ini walaupun ketiadaan keterangan mengenai kelewatan untuk memfailkan pemohonan di bawah lampiran 26 (lihat perenggan 12).

(2) Responden telah bertindak dengan sewajarnya untuk mengetepikan perintah *ex parte*. Oleh itu, beliau tidak sepatutnya dihalang daripada meneruskannya disebabkan kegagalan beliau untuk memberikan alasan-alasan kelewatan di dalam memfailkan lampiran 26. Mahkamah sepatutnya lebih bertimbangrasa di dalam permohonan-permohonan di mana perintah diperolehi secara *ex parte* (lihat perenggan 12).

(3) Responden tidak sepatutnya dinafikan peluangnya di mahkamah untuk meneruskan hujah-hujahnya untuk mengetepikan perintah bertarikh 17Jun 2004. Ini merupakan kes yang sesuai dan wajar untuk mahkamah menggunakan budi bicaranya. Tiada apa carapun menunjukkan pemohon mungkin mengalami ketidakadilan dan prejudis (lihat perenggan 12).]

Notes

For a case on extension of time, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 4541.

Legislation referred to

Companies Act 1965 ss 128(4), (7), 144, 145
Rules of the High Court 1980 O 3 r 5, O 41 r 13, O 42 r 13

Bahari Yeow (Lee Hishamuddin Allen & Gledhill) for the applicant.
Conrad Yong (Elizabeth Loo with him) (Sivanathan) for the respondent.

Abdul Wahab Said Ahmad J:

[1] The respondent filed an application (encl 26) under O 3 r 5 of the Rules of the High Court 1980 for an extension of time to file his summons in chambers dated 6 August 2004 (encl 13), to set aside the Court's Order of 17June 2004 and to declare the EGM held on that date invalid.

[2] The applicant is a public listed company. At the material times, the respondent was a director of the applicant and held about 1.89% of applicant's shareholding. On 19 May 2004, the applicant issued two notices of meeting, namely:

(a) 44th Annual General Meeting ('AGM'); and

(b) Extraordinary General Meeting ('EGM');

[3] Both the AGM and EGM were to be held on 17 June 2004. The AGM was fixed at 9.30am, and the EGM at 10.30am or immediately after the conclusion of the AGM. The agenda for the EGM was to consider an ordinary resolution to remove the respondent as a director of the applicant with immediate effect.

[4] On 16 June 2004 at about 3.30pm the applicant received representations submitted by the respondent pursuant to s 128 of the Companies Act 1965. Applicant then instructed solicitors to apply under a certificate of urgency for an order under s 128(4) of the Companies Act 1965. On 17 June 2004 the applicant's solicitors obtained the order under s 128(4) Companies Act 1965 from this court that the representations of the respondent need not be sent out to the members and need not be read out at the EGM. A sealed copy of the draft Order was served on the respondent at the EGM. The EGM proceeded, and the Respondent was removed as a director by majority of votes of the shareholders.

[5] On 6 August 2004, the respondent filed encl 13 pursuant to O 42 r 13 of the Rules of the High Court 1980. It would appear the last day for filing encl 13 would be 4 August 2004. Enclosure 13 was filed two days late on 6August 2004 while encl 26 for extension of time to file encl 13 was filed on 11 March 2005, ie about seven months and seven days from service of sealed Order.

[6] The respondent's grounds in making the application for extension of time to file the application are that firstly, the sealed order dated 17 June 2004 and the various cause papers and affidavits were first served on the respondent's solicitors on 5 July 2004, and further affidavits were served on the respondent's solicitors on 12 July 2004. The second ground was that the respondent required time to study the facts and the law relating to this action and to prepare, compile and affirm the summons in chambers dated 6 August 2004 (encl 13) and the affidavit in support. The respondent was advised by his solicitors that the issues arising in this case are issues upon which there are no

known local authorities on the matter. The preparation of encl 13 took time, particularly the affidavit in support, which ran into 11 volumes, containing 3,631 pages in all, including exhibits.

[7] The third ground is that the purported delay is only two days and finally that no prejudice or substantial miscarriage of justice has been occasioned to the applicant. The applicant had ample opportunity to respond to encl 13 and indeed, they have responded.

[8] It is trite law that the rules of court must be obeyed. Application for extension of time during which some steps in procedure are required to be taken, must contain satisfactory grounds to merit the extension, before the court would exercise its discretion. Court has a wide discretion and has in proper and deserving cases granted extensions of time. Order 1A of Rules of High Court had expanded this discretion as the court or judge shall have regard to the justice of the particular case and not only to the technical non compliance of any of the rules therein. The respondent had explained the two days' delay before filing encl 13 but did not explain the delay of seven months and seven days when making the application under encl 26.

[9] Learned Counsel for applicant said it will cause prejudice and occasioned substantial miscarriage of justice to the applicant. The applicant would be deprived of its right to have his legal argument put before this court that encl 13 should be dismissed for non compliance of O 41 r 13. That right of the applicant is an important statutory right as provided under O 42 r 13 of RHC.

[10] He further contended that all necessary actions had been taken by the Applicant to inform the Bursa Malaysia and Companies Commission of Malaysia on the removal of the respondent as a director of the applicant effective on 17 June 2004. The respondent has various other remedies, inter alia he could seek damages under s 128(7) of the Companies Act 1965 if he can prove that the removal was wrongful or he could convene an extraordinary general meeting of the appellant under ss 144 and 145 of the Companies Act 1965 for the purpose of electing him as a director.

[11] He next submitted that the evidence shows that encl 13 is now academic. In the originating summons, the applicant has sought and obtained an order that the representations should not be sent out or read at the EGM or at any adjournment thereof. The EGM is now over, and the resolution to remove the respondent as a director of the applicant was duly passed and approved by members at the EGM. There is no living issue before the honourable court in so far as the originating summons is concerned. The date 17 June 2004, and the prayer for the representations not to be sent and read at the EGM would not come alive again. The Order has been fully implemented . It is trite law that the court will not hear a case in deciding an academic question.

[12] Having heard both parties in this application, I find that the respondent's application, if granted, will not cause any miscarriage in justice to the applicant. The delay is a mere two days. I do not think that the respondent should be barred from filing his application because of the two days delay, being 32 days after the service of the cause papers by the applicant's solicitors on 5 July 2004. The fact that the applicant had responded to the respondent's application in encl 13 showed that there is no miscarriage of justice or prejudice to the applicant. In fact the applicant filed seven affidavits in reply. Applications for extension of time must be made early but the fact that it is made late should not be a ground for refusal of court's exercise of discretion. The fact that voluminous exhibit had to be filed in their application under encl 13 resulting in a delay of two days in filing it should be sufficient ground to grant this application notwithstanding the absence of explanation of delay in filing the application in encl 26. As to whether encl 13 will be academic, I am not prepared to say respondent's legal recourse is limited to s 128(7) of the Companies Act 1965. This could be ventilated further in the substantive arguments on setting aside of the order. At the end of the day the court will have to consider the injustice if any caused to the applicant. The applicant's contention that it would be deprived of its right at the hearing of encl 13 to object to the procedural non compliance by the respondent is without merit. The applicant had already raised it in opposition to this application for extension of time. The respondent had acted diligently in pursuing the setting aside of the *ex parte* order. He should not be thwarted from pursuing the setting aside application because of his failure to give reasons for delay in filing encl 26. The court should be more lenient in these applications where the order had been obtained *ex parte*. To my mind, the overriding consideration is that the respondent should not be denied his day in court to pursue his substantive arguments for setting aside the Order of 17June 2004. This is a fit and proper case for the court to exercise its discretion and excused the respondent for the absence of the reasons for the delay in filing encl 26. There is no way in which the applicant could possibly have suffered any injustice or prejudice on this non compliance. Hence, I allowed the respondent's application for extension of time to file his application in encl 13 with costs to applicant.

Application allowed.

Reported by Mohd Nizam Hamdan